

**MOTION FILED**

**APR 3 1985**

**No. 84-518 and No. 84-710**

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**IN THE**  
**Supreme Court of the United States**  
**OCTOBER TERM, 1984**

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**ROBERT W. JOHNSON, et al.,**  
*Petitioner,*  
**v.**

**MAYOR AND CITY COUNCIL OF BALTIMORE,**  
*Respondent.*

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**EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,**  
*Petitioner,*  
**v.**

**MAYOR AND CITY COUNCIL OF BALTIMORE,**  
*Respondent.*

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**On Writ of Certiorari to the United States Court  
of Appeals for the Fourth Circuit**

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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE  
AND BRIEF OF NATIONAL LEAGUE OF CITIES AS  
AMICUS CURIAE IN SUPPORT OF THE RESPONDENT**

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## QUESTION PRESENTED

Whether the bona fide occupational qualification ("BFOQ") under the Age Discrimination in Employment Act, 29 U.S.C. 621, *et seq.*, has been rendered meaningless by the Equal Employment Opportunity Commission's decision to challenge mandatory retirement laws affecting municipal public safety workers on a case by case basis?



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**MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE**

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National League of Cities moves the Court under Rule 36 for leave to file the attached brief *amicus curiae* in the above-entitled case, and in support thereof states:

(iii)

1. National League of Cities ("NLC") is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their governmental functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all, approximately 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized in its Bylaws include "the safeguarding of the interests, rights and privileges of municipalities."

2. NLC's members will be directly affected by the outcome of this case. A 1982 survey by the International City Management Association of municipalities with a population of 10,000 or more shows that 64.7 percent of the 1,058 respondents have established mandatory retirement for firefighters at an age below 70 years. The average age at which retirement was so required was 64. Granito, *Fire Personnel Practices*, International City Management Association Base Line Data Reports 12 (Feb. 1983). Another recent survey of police departments taken by the Fraternal Order of Police covering cities with populations of 25,000 or more showed that nearly 60 percent of the surveyed departments had compulsory retirement ages below 70 years of age. More specifically, of 542 systems surveyed, 316 set mandatory retirement at ages ranging from 55 to 68. Government Employee Relations Report (BNA) ¶¶ 712151-71:2177.

3. Since the Age Discrimination in Employment Act, 29 U.S.C. 621, *et seq.* ("Act"), was amended in 1974 to include state and local governments, the courts have been deluged with suits brought by the Equal Employment Opportunity Commission ("EEOC") challenging the validity of mandatory retirement laws established by states and municipalities. See Appendix A, *infra*.

4. This case presents the Court with the opportunity to clarify the circumstances in which age based, involuntary retirement of municipal firefighters and police

officers will satisfy the BFOQ exception to the Act. Clarification will put an end to the current practice of the EEOC of case by case litigation which burdens the judicial system, jeopardizes older firefighters and public safety, and disrupts planning and budgeting on the part of affected municipalities.

5. NLC wishes to participate in this case in order to provide the Court with a broader understanding of the need for clear standards that are workable in the context of local government operations and serve the purposes of the Act.

6. Consent to the filing of a brief *amicus curiae* has been sought from the parties but has been refused by counsel for the individual Petitioners, Robert W. Johnson, *et al.*

Respectfully submitted,

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**INTEREST OF THE AMICUS CURIAE**

The interests of National League of Cities are set out  
in the foregoing Motion.

**STATEMENT OF THE CASE**

National League of Cities agrees with the statement  
of the case submitted by the Respondent ("City"). In  
addition, NLC wishes to call the Court's attention to the  
following facts that demonstrate the importance of this  
case to its constituent local governments.

This case was originally brought by six Baltimore City firefighters, covered by the City's retirement system generally requiring retirement of public safety employees at age 55, who objected to application of the age provisions of the system, challenging their validity under, among other things, the Act.

The record below shows the City's retirement age for all municipal employees was originally set at age 70; but in 1962 a separate retirement system, limited to public safety employees and providing in part for involuntary separation at age 55, was adopted—largely because of concerns expressed by the affected unions and because of mortality data they presented.

Current, detailed information on firefighter mortality compared with other occupations on a nation-wide basis is not readily available. Neither governmental nor private agencies regularly collect comparative figures on accident, disability and mortality experience giving discrete data on firefighters. Notwithstanding these deficiencies, it is generally recognized that sudden stress and exertion associated with firefighting express themselves through an incidence of cardiovascular and atherosclerotic disease well in excess of that experienced by the population at large, particularly in ages beyond 50 years. Barnard, *Heart Disease in Firefighters*, Parts I-IV, Fire Command, National Fire Protection Association (Aug.-Nov. 1979); Society of Actuaries, *Occupational Study* (1967).

In 1950, the only year for which mortality data by occupation and industry for the entire United States have been published, deaths among firefighters aged 60-64 by reason of atherosclerotic disease were more than twice as high as was the case for all occupations, 20.40 per thousand compared to 9.90 per thousand. Public Health Service, U.S. Dep't of Health, Education and Welfare, Special Reports, *Mortality by Occupation and Industry Among Men 20 to 64 Years of Age: United States, 1950*,

Vol. 53, No. 1 (1962); Public Health Service, U.S. Dep't of Health, Education and Welfare, Special Reports, *Mortality by Occupation and Cause of Death Among Men 20-64 Years of Age: United States, 1950*, Vol. 53, No. 2 (1963). See also Barnard, *supra*. A corresponding ratio of deaths obtained in the case of the 55-59 year age group, where atherosclerotic deaths per thousand among firefighters were 13.95 as compared to 6.75 for all occupations. *Id.*

The same pattern appeared where all cardiovascular diseases were considered. Death rates from cardiovascular disease per thousand for firefighters aged 60-64 and 55-59 were 38.51 and 21.18, respectively, compared to 17.20 and 11.26, respectively, for the corresponding age groups in all occupations. *Id.*

Nor do more current figures indicate any lessening of the toll taken by heart disease on aging firefighters: The 1982 Annual Death and Injury Survey taken by the International Association of Fire Fighters shows that the average age of firefighters dying from heart attacks in that year was 55 years; that heart attacks were responsible for 41.6 percent of all reported line of duty deaths among firefighters (the largest single cause); that heart disease was the cause of over 69 percent of firefighter retirements due to occupational disease; and that the average age of those so forced to retire in 1982 was 51 years.

Under these punishing circumstances, self-selection out of the fire service generally takes place at an age younger than the mandatory retirement age under consideration here. Appendix B contains a chart prepared from 1980 Census data showing the distribution, by age, of active firefighters (exclusive of inspectors and supervisory personnel) contrasted with the corresponding distribution of the United States work force in all occupations. These data show that the percentages of firefighters concentrated in the younger age groups 25-34 (40.2%) and 35-44

(28.5%) far exceed the percentages in the same age groups in the case of the general work force (28.5% and 19.9%, respectively). By contrast, Appendix B shows the proportions to be markedly reversed for age groupings 45-54 and 55-64, after which only three-tenths of one percent of all firefighters are age 65 or over compared with three percent for all occupations. Put another way, the chart demonstrates that the hazards involved make firefighting a young person's profession. Mandatory retirement ages have little bearing on the fact that firefighters leave their occupation, either by reason of death, disability, voluntary retirement or change of work, at ages well below those that prevail for all other occupations.

Acknowledging the physical problems firefighting creates among older personnel, the International Association of Fire Fighters as recently as May of 1984 urged Congress to amend the Act so as to exclude firefighters from coverage and to permit their mandatory retirement:

Most arbitrary age discrimination occurs due to stereotyping that is largely unsupported by objective facts. It was precisely this sort of discrimination that the [Act] was created to prohibit. However, there are instances that the [Act] does not address where a mandatory retirement age and a maximum hiring age are crucial to the professional and competent operation of specific professions. Most often, great physical and mental demands are inherent elements of these professions. We believe that employment policies which consider age as an eligibility factor for professions that require great physical and mental exertion are based on objective facts and hence have merit.

Various studies have illustrated the fact that younger fire fighters can better cope with the strains of fire fighting than can older ones due to the physical infirmities that characteristically afflict older men and women. Simply, the older the fire fighter is the greater the odds are that he or she will become



injured, disabled, or die while on duty. Age Discrimination in Employment Act Amendments, Hearings on H.R. 2161, H.R. 3093, H.R. 5310 Before Subcomm. on the House Comm. on Education and Labor, 98th Cong., 2d Sess., 86 (1984).

It was in response to corresponding representations on the part of the affected unions and employees, as well as in the interest of public safety, that the City of Baltimore in 1962 established 55 years as the mandatory retirement age for its firefighters and police officers.

### SUMMARY OF ARGUMENT

The Act provides that age may be used as a "bona fide occupational qualification" where "reasonably necessary to the normal operation of the particular business." 29 U.S.C. 623(f)(1). Congress gave EEOC authority under the Act to "cooperate" with state and local governments and to "establish . . . reasonable exemptions to and from any or all provisions of [the Act]." 29 U.S.C. 625(b), 628.

Nevertheless, regulations published by EEOC, coupled with that agency's practice of repeated intervention in cases involving mandatory retirement of state and local public safety officers, demonstrates that, in practice, municipal governments cannot rely on the BFOQ defense under any circumstances. Instead they must be prepared to defend mandatory retirement ages on a case by case basis. Moreover, in some instances the Courts of Appeal have drawn standards for the BFOQ so narrowly as to force the same practical result. See, e.g., *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976).

The Court has acknowledged in *EEOC v. Wyoming* that, the Act notwithstanding, states and localities remain free to establish BFOQ's so long as they meet a federal standard of reasonableness. 460 U.S. 226, 240 (1983). The Court below found such a standard in Con-



gress' determination that federal firefighters may be required to retire at age 55. See 5 U.S.C. 8335 (b).

In the event the Court should conclude to the contrary, NLC urges that the Court establish clear and workable guidelines to put an end to the uncertainties resulting from the failure of EEOC to provide guidance clarifying the circumstances under which mandatory retirement of firefighters and other public safety personnel prior to age 70 is permissible.

### ARGUMENT

#### **I. In Addition to Physical Hazards to the Participants and the Public, the Indeterminate Retirement Age Resulting From EEOC Practice Needlessly Disrupts the Municipal Planning, Budgeting and Hiring Process.**

Putting to one side the risks to older firefighters of continuing in service and the accompanying hazard to their colleagues and the public, there remains to be noted the potential for disruption of "the normal operation of the particular business" of running a city such license presents. 29 U.S.C. 623(f) (1).

Municipal firefighters and other public safety personnel are compensated by salaries and retirement benefits commensurate with the risks involved. To ensure that these financial obligations are met, municipalities establish compensation plans which provide relatively high salaries for active personnel and relatively generous pension benefits at an early retirement age. Salary levels and retirement benefits are generally related, with retirement benefits calculated on the basis of the final year's salary (or a similar base). These obligations are met almost entirely with tax dollars and, as a consequence, cities are obligated to establish long-term plans for meeting their financial requirements. A mandatory retirement age clearly establishes the maximum number of years during which a firefighter may be a salaried employee; it also

establishes with some certainty the date on which a city will become obligated to pay retirement benefits.

After determining the revenues which a city must budget in a particular year for salaries and retirement benefits, the city must go on to address related issues, such as the number of active firefighters needed in a particular year and how its staffing obligations may be affected under Title VII of the Civil Rights Act of 1964.

Neither such financial nor staffing decisions can be realistically made, however, in any city in which the validity of a mandatory retirement age has not yet been adjudicated under the Act.

## **II. Cities Are Often Required by State Law to Maintain Mandatory Retirement Ages for Public Safety Personnel.**

In many states the legislature has established mandatory retirement ages for state and local public safety personnel. These mandatory retirement ages are often included in laws defining pension benefits for retired police officers or firefighters, and where disregarded may jeopardize eligibility for retirement benefits. In California, for example, firefighters may be involuntarily retired at age 60 after 20 years of service and are entitled to 50 percent of the salary received in the year prior to retirement. CAL. GOV'T CODE § 50870. In New Jersey, police officers and firefighters are required by state law to retire at age 65. N.J. REV. STAT. § 17:4-6.14. *See also* MASS. GEN. LAWS ANN. Ch. 32, § 83A(d) and WYO. STAT. § 15-5-307. Indeed, the Chief Justice recently noted that over one half the states have mandatory retirement laws that may violate the Act. *See Wyoming, supra*, at 253, n.2 (Burger, C.J., dissenting).

Plainly unless this Court establishes clear standards for determining a BFOQ of general application municipalities will continue to be caught between the mandates of state law and the EEOC enforcement process.

### III. EEOC's Case By Case Approach to Mandatory Retirement Nullifies Congress' Intent to Provide a BFOQ Defense.

Regulations published by EEOC under the Act force case by case adjudication of the validity of all mandatory retirement ages which are less than 70 years, including retirement ages for public safety personnel:

Whether occupational qualifications will be deemed to be "bona fide" . . . will be determined on the basis of *all the pertinent facts surrounding each particular situation*. 29 C.F.R. 1625.6(a) (emphasis added).

And further:

An employer asserting a BFOQ defense has the burden of proving that (1) the age limit is reasonably necessary to the essence of the business, and either (2) that all or substantially all individuals excluded from the job involved are in fact disqualified, or (3) that some of the individuals so excluded possess a disqualifying trait that cannot be ascertained except by reference to age. *If the employer's objective in asserting a BFOQ is the goal of public safety, the employer must prove that the challenged practice does indeed effectuate that goal and that there is no acceptable alternative which would better advance it or equally advance it with less discriminatory impact*. 29 C.F.R. 1625.6(b) (emphasis added).

In pursuit of this standard, EEOC has since 1979 brought over 30 lawsuits against state and local governments alleging violations of the Act in the case of public safety personnel. See Appendix A, *infra*.

In addition to disrupting "normal operations" of local government, lawsuits in such numbers have imposed (and EEOC's policies will continue to impose) an unwarranted burden on the courts. Moreover, the courts have been unable to establish clear and consistent BFOQ standards applicable to public safety officers. See *Orzel v. Wauwatosa Fire Dep't*, 697 F.2d 743 (7th Cir. 1983) (mandatory

retirement age of 55 for firefighters is not a BFOQ); *Campbell v. Connelie*, 542 F.Supp. 275 (N.D. N.Y. 1982) (mandatory retirement age of 55 for state police is not a BFOQ); *EEOC v. Minneapolis*, 537 F.Supp. 750 (D. Minn. 1982) (mandatory retirement at 65 for police captains is not a BFOQ). *But see EEOC v. Commonwealth of Pennsylvania*, 596 F. Supp. 1333 (M.D. Pa. 1984) (mandatory retirement age of 60 for state policemen is a BFOQ); *EEOC v. St. Paul*, 500 F. Supp. 1135 (D. Minn. 1980) (mandatory retirement age of 65 for employees of fire department is a BFOQ); *Mahoney v. Trabucco*, 738 F.2d 35 (1st Cir. 1984) (mandatory retirement age of 50 for state police is a BFOQ); *EEOC v. Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984) (mandatory retirement age of 60 for state troopers is a BFOQ).

If the validity of mandatory retirement ages for public safety personnel continues to be litigated on a case by case basis, hundreds of lawsuits could be involved, many involving the same witnesses, with no assurance based on results to date that any mandatory retirement age short of 70 years of age can safely be regarded as a BFOQ.

#### **IV. The Court Should Impose Guidelines for a Workable BFOQ Covering Local Public Safety Officials.**

The immediate aim of this brief is to urge that the decision of the Court of Appeals be affirmed. But, more important, NLC wishes to call to the attention of the Court the dilemma which confronts hundreds of municipal officials charged with the responsibility of providing their communities with adequate fire protection services consistent with safety for firefighting personnel and, at the same time, compliance with the mandates of the Act.

The Court should take notice of the fact that firefighting is the most physically demanding of occupations. To permit firefighters to serve in this exacting activity until they reach the age of 70 is neither in the public interest nor

in the interests of firefighters. Clearly these judgments are based upon reasonable perceptions of reality rather than predilections of city officials to stereotype firefighters on the basis of age.

The Act recognizes the need and the appropriateness of an age specific retirement standard for firefighters provided there is a reasonable relationship between the normal function of the employing organization, the demands of the job, and the age of the employees.

Accordingly, the issue facing municipal officials is what mandatory retirement age for firefighters will be regarded under the dictates of the Act not as a manifestation of age based discrimination, but rather as an acceptable occupational qualification?

Although given ample authority to resolve this question, EEOC has chosen to resort to the judicial process as if every mandatory retirement age for firefighters of less than 70 years is a question of first impression.

NLC urges this Court to recognize that the validity of a mandatory retirement age is not simply the ultimate probity of the scientific and medical evidence employed. Rather, the issue should be whether the age chosen has a reasonable relationship to the demands of the work.

The Court of Appeals has chosen a reasonable and pragmatic solution to these questions. It concluded that a mandatory retirement age adopted by a municipality after fair and open negotiations between the representatives of the interested parties, which retirement age also coincided with a federal retirement statute for the same occupation, was not the age based discrimination interdicted by federal law. Instead the selected age was reasonably related to the occupational requirements in question and consequently consistent with the non-discriminatory mandate of the Act.

Should this Court find it necessary to reject the Court of Appeal's realistic solution, NLC respectfully requests



that the Court supply further guidance on the application of the BFOQ. Responsible municipal officials in communities across the nation are confronted with substantially the same questions and issues as are before this Court in this matter. Such officials (and EEOC) require standards and guidance that will serve permanently to end these controversies.

### CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

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